No. 89-1508

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA
and NGPL-TRAILBLAZER, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a jury award of damages to a regulated natural gas pipeline based on its customer's alleged breach of an implied contractual good-faith duty to purchase gas was preempted by federal regulation of the gas sales contract, where the federal regulatory agency had specifically invalidated the contract provisions requiring the customer (also a regulated pipeline) to purchase the gas at issue, and the damages awarded gave the pipeline seller the precise rate that had been rejected by the agency.

2. Whether the court of appeals correctly rejected the pipeline seller's attempted-monopolization claim against its customer on the ground that there was no dangerous probability of success, where, *inter alia*, (a) the seller claimed that its customer was not seeking to obtain monopoly power itself but to confer such power on a group of three other, independently owned and operated pipelines in a different market, (b) one of those other pipelines was owned by the plaintiff seller itself, and (c) the gas sales contract between the customer and seller, which was the sole tool of the customer's alleged attempt, strictly limited, in both magnitude and duration, any increase in the putative monopolist's market strength to non-monopoly levels.

AFFILIATED CORPORATIONS

Pursuant to Rule 29.1 of the Rules of this Court, respondents state: Respondent NGPL-Trailblazer, Inc., has no non-wholly owned subsidiaries and is wholly owned by respondent Natural Gas Pipeline Company of America (Natural). Natural has no non-wholly owned subsidiaries. Certain preferred stock aside, all of Natural's stock is owned by MidCon Corp., which is wholly owned by Occidental Petroleum Corporation.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 885 F.2d 683. The opinion of the district court (Pet. App. 29a-86a) is reported at 661 F. Supp. 1448.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1989. Pet. App. 1a. A petition for rehearing, with suggestion for rehearing en banc, was denied on December 12, 1989, with no judge voting for

rehearing. Pet. App. 87a-88a. The petition for a writ of certiorari was filed on March 26, 1990, within the time allowed by an extension of time granted by Justice White on February 28, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case involves an attempt by petitioner Colorado Interstate Gas Co. (CIG), a regulated pipeline, to obtain relief before a jury from adverse orders of the Federal Energy Regulatory Commission. In 1984, FERC invalidated the longstanding contractual minimum purchase obligations of all pipeline customers like respondent Natural Gas Pipeline Company of America (Natural) and set a specific rate that Natural was to pay for gas not purchased. FERC took those steps, fully cognizant that they would impose burdens on pipeline sellers such as CIG, in order to free customers to pick and choose among suppliers, and thereby subject pipeline sellers and gas producers to market forces. The FERC rulings were upheld against CIG's and others' challenges on appeal.

Nevertheless, when Natural exercised its right to reduce its purchases from CIG, CIG pursued the present suit to recover damages for unpurchased gas. Seeking precisely the rate that FERC had expressly rejected, CIG sued for both breach of contract and attempted monopolization. The court of appeals denied the contract claim on the ground that it was inconsistent with the FERC orders. It denied the antitrust claim on the ground that CIG had not proved a dangerous probability of success and thus had failed to transform its contract-based complaint about Natural's reductions in purchases into a claim that Natural attempted to monopolize. Petitioner challenges those rulings.

1. *Background.* a. CIG and Natural are both natural gas pipelines regulated by FERC. Under a Service Agreement between the two companies, Natural was en-

titled to buy certain volumes of gas from CIG at either a higher (H-1) or lower (F-1) rate, depending on where the gas was delivered. The Agreement also obligated Natural to pay CIG the full price for 90% of its contractual entitlement even if it actually took less gas. In particular, Section 2 of the Agreement specified minimum daily volumes of gas covered by the contract, and Section 4 specified a corresponding minimum payment, calculated annually for the volumes Natural was obliged to buy. For any deficiencies in takes of either H-1 or F-1 gas, Natural was to pay the F-1 rate.

By late 1982, there was a severe glut in the supply of natural gas. Despite that fact, pipeline sellers were able to maintain high prices because of the widespread existence of minimum purchase provisions like those in the CIG-Natural Agreement. Consequently, Natural and other pipelines found it increasingly difficult to resell gas to local distribution companies and the consumers they served. *See Wisconsin Gas Co. v. FERC*, 770 F.2d 1144, 1157-59 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986). Natural responded by reducing or renegotiating its purchases under thousands of contracts with its suppliers. Tr. 3088-94; DX 2191. When Natural asked CIG to reduce the amount of high-cost H-1 gas it would have to purchase, CIG refused. *See* DX 153, 317. Finally, on July 20, 1983—three weeks after a FERC administrative law judge cast doubt on whether buyers like Natural would be able to pass on to their customers the costs of expensive gas purchased under contested minimum bill provisions (*United Gas Pipe Line Co.*, 23 FERC ¶ 63,125, at 65,352 (1983))—Natural informed CIG that it would cease taking H-1 gas, while continuing to take the lower cost F-1 gas.[1]

By that time, in a rate proceeding initiated by CIG in 1982 and contested by Natural, FERC had begun to

[1] Ten copies of the FERC orders that are pertinent to this case have been lodged with the Clerk of the Court.

examine the lawfulness of the minimum purchase provisions in Natural's contract with CIG. In October 1983, a FERC administrative law judge ruled that the minimum daily take and minimum bill provisions of Sections 2 and 4 of the CIG-Natural Service Agreement were unjust and unreasonable and therefore unlawful. 25 FERC ¶ 63,012, at 65,020-21. On May 25, 1984, the full Commission adopted the same position—both in the CIG-Natural rate proceeding (27 FERC ¶ 61,315) and in a general rulemaking applicable to the entire industry (*Order 380*, FERC Stats. & Regs. ¶ 30,571). The express aim of FERC's action was to allow customers such as Natural "to pick and choose among their pipeline suppliers" and thereby to force selling pipelines to lower their prices and negotiate lower prices from their suppliers. *Order 380* at 30,958, 30,963. *See also Order 380-C*, FERC Stats. & Regs. ¶ 30,607 (1984); *Order 380-D*, 29 FERC ¶ 61,332 (1984).

Having declared it unlawful for CIG and other pipelines to bind their customers either to take gas or to pay the full commodity rate for untaken gas, FERC specifically ordered CIG to file a new tariff providing for payment by Natural of only the fixed costs of F-1 gas for any gas not taken.[2] 27 FERC ¶ 61,315, at 61,584. CIG nevertheless tried to file a rate allowing it to charge the higher H-1 fixed costs for untaken H-1 gas, but FERC rejected that filing (29 FERC ¶ 61,124 (1984)) and instead insisted on an F-1 fixed-cost rate for any gas not taken (30 FERC ¶ 61,073 (1985)). On CIG's challenge, the Tenth Circuit affirmed, explaining that CIG's proposed H-1 fixed-cost rate would improperly give CIG full profits on unsold gas and thereby deter price

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[2] A pipeline's "fixed costs" include profits on pipeline operations as well as those costs which do not vary with the volume of gas sold. The main "variable" cost thus excluded is the cost of the gas itself. The full "commodity rate" includes both fixed and variable costs.

reductions, and this Court denied certiorari. *Colorado Interstate Gas Co. v. FERC*, 791 F.2d 803, 811 (10th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987) (*CIG I*); *see* Pet. App. 7a.[3]

The Commission's orders invalidating the minimum purchase requirements of the Service Agreement, and setting an F-1 fixed-cost rate for untaken gas, were effective as of September 1982, the date on which CIG's new tariff took effect. Accordingly, for the entire period at issue in this case—including July 1983, when Natural initially reduced its purchases of H-1 gas—Natural was under no contractual obligation to purchase CIG's gas, and the only rate CIG ever had on file with FERC for gas not taken by Natural was the F-1 fixed-cost rate, which Natural has always paid or stood ready to pay under FERC tariffs.[4]

b. Although Natural's reduction in purchases lies at the heart of this case, one of CIG's claims also involves the transportation of natural gas produced in Wyoming. CIG has long been the dominant transporter of that gas. Pet. App. 52a. In the early 1980s, a new route out of Wyoming—the so-called "Trailblazer System"—was added to the several existing pipelines providing transportation services to shippers of Wyoming gas. As the court of appeals noted, however, the "Trailblazer System" is not a single pipeline, or a single economic or legal entity in any respect. Pet. App. 18a n.15. The name refers simply

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[3] The Commission's general rule invalidating minimum purchase requirements industry-wide was also upheld on appeal. *Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

[4] In setting the F-1 fixed-cost rate for gas not taken, FERC stated that it might allow even less in CIG's next rate case. 27 FERC ¶ 61,315, at 61,583. Ultimately, FERC did in fact eliminate *all* payments for untaken gas. 41 FERC ¶ 61,179, at 61,466 (1989), *petition for review pending, Colorado Interstate Gas Co. v. FERC*, No. 88-1932 (10th Cir., argued Jan. 18, 1990).

to three independently owned and operated pipelines, physically connected end to end, that together run from the Overthrust region of western Wyoming to eastern Nebraska. Each of those independent pipelines—none of which Natural controls—develops, files, and justifies its own FERC tariffs. Ownership of the three pipelines differs: Natural owns 18% and CIG owns 10% of the short western pipeline; CIG itself is the sole owner of the 265-mile trans-Wyoming pipeline; and respondent NGPL-Trailblazer, a subsidiary of Natural, owns 33% of the 447-mile eastern pipeline, which runs from eastern Colorado to eastern Nebraska.[5] Hence, any gas that flows through the entire "Trailblazer System" must flow through CIG's segment, and the eastern segment (of which Natural owns only one third) cannot receive gas except from the pipeline wholly owned and controlled by CIG.[6]

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[5] Contrary to CIG's suggestion (Pet. 7), Natural does not control even the eastern segment of the "Trailblazer System," but is simply a one-third partner in that pipeline. CIG is flatly wrong in asserting that Natural "assumed the . . . debt" of the "system." *Ibid.* Although Natural undertook contractually to pay certain charges as a shipper reserving capacity on the "system," that obligation—like any other shipper's purchase of reserved pipeline capacity—did not give Natural control over any of the three pipelines. In fact, Natural did not establish the rates charged by any of the three pipelines, received no share of the revenues from CIG's wholly owned trans-Wyoming segment, and shared in profits of the other two pipelines only in proportion to its minority ownership. Tr. 5057-60, 5071-72.

[6] The map in petitioner's appendix (at 75b) is neither in the record nor fairly reflective of the facts. For example, it incorrectly represents the "Trailblazer System" as a single entity and neglects to note that the entire 265-mile trans-Wyoming portion of that "system" is owned by CIG. It also omits the several other pipelines that compete with those drawn and that controlled 65% of the capacity to transport gas, and carried roughly 33% of the gas shipped, in the market defined by CIG in its antitrust case. DX 3093, 3017. In addition, the map mischaracterizes rates. For one thing, there is no "Trailblazer System" rate. The "rate" on CIG's

2. *The Present Lawsuit.* CIG filed this action in the District of Wyoming in April 1984, seeking damages under contract, tort, and antitrust theories, all ultimately based on the view that Natural's July 1983 reduction in purchases of H-1 gas violated the Service Agreement. CIG argued that Section 2 of the Agreement required Natural to take the specified minimum volumes and to pay *H-1 fixed costs* (the rate FERC rejected in favor of the F-1 fixed-cost rate) for H-1 gas not taken.[7] Based on that argument, CIG crafted two contract theories: first, it alleged that Natural had breached the minimum take obligation of Section 2 of the Service Agreement; second, it alleged that Natural had breached an implied contractual duty of good faith and fair dealing. The latter theory sought "the same damages" under "the same legal standards" as did the first. CIG C.A. Br. 90 n.97. CIG did not identify what amount of gas Natural would have purchased in good faith, but simply relied on Natural's failure to meet its 90% take obligation.[8]

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map is a summation of rates of the three independent component pipelines. Also, the map omits the particular rate, which was lower than CIG's rate, that attracted the only shipper (other than Natural) that CIG proved to have placed new business with the "Trailblazer System" rather than with CIG. *See* DX 2124; Tr. 4621.

[7] CIG sought $106,580,792 in "fixed costs/lost profits" for all unpurchased gas, H-1 and F-1. CIG also sought $53,216,364 in consequential damages covering minimum purchase payments it made to one of its suppliers for gas that CIG allegedly could not take and resell because of Natural's reduction in purchases.

[8] The verdict form (which was proposed by CIG) contained a single entry asking the jury to specify the contract damages if it found liability under either or both contract theories. The verdict form did not ask the jury to determine what volumes Natural would have bought in the absence of the alleged bad faith. Similarly, CIG's only evidence of contract damages focused exclusively on the Section 2 minimum. *See* PX 1769 (comparing Natural's purchases with Section 2 minimum); DX 3036 (CIG expert's damage calculation); Tr. 2552-53, 2561 (CIG expert testimony); Tr. 8622-24 (CIG closing argument reciting Section 2 basis for damages).

CIG also attempted to construct an antitrust claim out of its contract-based complaint, charging attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. CIG's claim was unusual in that it did not allege that Natural had attempted to acquire monopoly power itself. Rather, CIG asserted that Natural sought to confer monopoly power on the three separately owned pipelines that make up the "Trailblazer System" and to exclude CIG as a competitor, even though CIG itself wholly owns the trans-Wyoming portion of the "system." According to CIG, moreover, the relevant market for antitrust purposes was not a market for the sale of gas, but a market for gas *transportation* services; and it was not for all transportation of Wyoming gas, but only for *long-distance* transportation outside Wyoming, Colorado, and Utah.[9] CIG charged that Natural sought to acquire monopoly power in that market "for the Trailblazer System" by ceasing to buy CIG's H-1 gas and by allegedly tying up CIG's pipeline capacity so that CIG could not offer long-distance transportation services to other shippers of Wyoming gas.[10] Despite the different legal elements (and even different markets) involved, CIG sought as damages for the alleged attempted monop-

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[9] Most Wyoming gas traditionally has been transported to that tri-State area. Pet. App. 52a; PX 1756, DX 3017. CIG had to exclude that region in order to allege a relevant market in which it was not the dominant firm. *See* DX 2097, 3094; Tr. 6468-70.

[10] Although CIG alleges that Natural's July 1983 reduction in purchases "had the effect of tying up roughly half of CIG's long-distance transportation capacity" (Pet. 8), it provides no support for that assertion. CIG cites a page in the court of appeals' opinion (Pet. App. 23a), but neither that page nor any other passage in the opinion specifies a 50% tie-up. In fact, as the court of appeals recognized, CIG offered no evidence of what portion of its capacity was affected by Natural's action. *See* Pet. App. 22a-23a n.19. Nor did it present evidence that any shipper ever had difficulty shipping gas long-distance out of Wyoming. To the contrary, there was evidence of 70% excess pipeline capacity during this period of glut. *See* DX 3017, 3093.

olization of long-distance transportation precisely the same damages as for the alleged contract breach ($159,797,156), *see* note 7, *supra*, plus certain additional consequential damages ($15,204,555).

The jury returned verdicts for CIG on all of its claims. The district court subsequently denied a motion for judgment notwithstanding the verdict. Pet. App. 29a-86a. After eliminating certain duplicative and improper damages, and trebling the antitrust award, the court entered judgment for $412,237,972—$60,388,000 for breach of contract; $343,841,133 for attempted monopolization; and $8,008,839 for tortious interference.[11]

3. *The Court of Appeals Decision.* The court of appeals reversed the contract and antitrust judgments against Natural. Pet. App. 1a-28a. The court held first that Natural was entitled to judgment on CIG's simple breach of contract claim because Natural in fact paid CIG the F-1 fixed-cost rate that FERC had set for untaken gas. *Id.* at 4a-9a. Rejecting as "irrational[]" CIG's position that FERC had invalidated only the annual minimum bill requirement of Section 4, and not the daily minimum take requirement of Section 2, the court explained that FERC had found both requirements unlawful and had modified both, providing for F-1 fixed-cost payments for all gas not purchased on both a daily and an annual basis. *Id.* at 8a-9a. CIG's claim for an H-1 fixed-cost rate for untaken gas was therefore preempted.

Based on the same series of FERC rulings, the court also found that Natural was "free from liability for failure to purchase gas based upon the implied duty of good faith and fair dealing in the Service Agreement." Pet. App. 10a. As with the simple contract theory, the court explained, the bad-faith damages award enabled

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[11] CIG alleged and prevailed on a tort cause of action, which the Tenth Circuit held not to be preempted. Pet. App. 14a-16a. That claim is not at issue in this Court.

CIG to "obtain[] an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas," yet "FERC and [the Tenth Circuit had] repeatedly denied CIG's request to modify the minimum purchase obligation of the Service Agreement to allow it to collect this rate for failure to purchase gas." *Id.* at 11a. In short, "the district court gave CIG a second chance to which it was not entitled." *Ibid.*

The court of appeals further rejected CIG's attempt to "imply a good faith limitation upon the scope of FERC's remedy for failure to purchase gas." Pet. App. 11a. To allow a jury to award a different rate whenever it found that the failure to purchase was not in good faith, the court ruled, "would permit circumvention of FERC authority through state contract law." *Id.* at 12a. The court noted that FERC itself, through an amicus filing in the Tenth Circuit, had urged reversal of the entire breach of contract award on the facts of this case. *Id.* at 12a-13a.[12] The court of appeals accordingly reversed the contract award for bad-faith failure to purchase as "impermissibly undermin[ing] the effectiveness of FERC orders." *Id.* at 14a.[13]

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[12] The court also noted that FERC had in another context (*see* p. 20, *infra*) preempted certain contractual claims while expressly declining to preempt certain tort claims. Pet. App. 13a. Without suggesting that FERC drew a rigid contract/tort distinction, the court of appeals concluded that, on the facts of this case, "FERC's modification of the contract remedy for failure to purchase gas does not limit CIG's right to seek damages for tortious interference with contract" (*id.* at 14a), whereas it does preclude CIG's contract award.

[13] The court added that the jury verdict on bad faith breach of contract would have to be set aside even if it were not preempted, because "the jury incorrectly found that Natural breached its obligation to purchase gas under Section 2 of the Service Agreement." Pet. App. 12a-13a n.10. The court explained that, in light of that fundamental error, "it is difficult to see how the jury could objectively consider the question of whether Natural acted in good faith." *Ibid.* The same doubt could apply to the jury's antitrust verdict.

The court of appeals reversed the antitrust judgment on the ground that CIG had failed to prove an essential element of its attempted monopolization claim—namely, that there was a dangerous probability of success. Pet. App. 20a-21a, 28a. The court noted the "unusual" nature of CIG's claim but declined to decide whether a defendant could, under any circumstances, be held liable for attempting to confer monopoly power on another entity. *Id.* at 17a; *see id.* at 18a n.15, 24a n.20. Assuming that such liability would be permissible in a proper case, the court concluded that the evidence made clear that there was never a dangerous probability that the "Trailblazer System" would actually acquire monopoly power as a result of Natural's actions. *Id.* at 20a-28a.

Starting its analysis with CIG's assertion that Natural's actions increased the "Trailblazer System's" market share from 41% to 54%, the court observed that those figures, while not themselves reflecting actual monopoly power, would likely support a jury finding of dangerous probability of acquiring monopoly power *if* this were a typical case involving a firm's use of economic coercion to acquire monopoly power. Pet. App. 21a-22a. The court concluded, however, that this was far from a typical case. "While the *Trailblazer System's* substantial market share demonstrates its *proximity* to monopoly status, it does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level." *Id.* at 22a. Here, the court explained, Natural's "capacity to commit the offense, the scope of its objective, and the character of its conduct" all were "strictly determined and ultimately limited by the Service Agreement between Natural and CIG." *Id.* at 23a. Natural's power consisted of its ability to reserve capacity on CIG's pipeline, and even after Natural had exercised that power fully, it was unclear whether Natural's conduct had affected market shares. *Id.* at 22a-23a n.19. At most, "Natural was still only able to raise

the Trailblazer System's market share to 54%." *Id.* at 23a.

> Thus, *from the beginning*, Natural's decision to quit purchasing gas presented no danger that Natural could do anything more than shift 13% of the market to the Trailblazer System. The necessarily limited scope of Natural's objective leaves no room for speculation about the probability that the Trailblazer System would gain a monopoly. There was simply no reasonable chance, let alone a dangerous probability, that Natural, through the exercise of its contractual rights, could imbue the Trailblazer System with sufficient market share to be a monopolist.

Id. at 23a-24a (footnote omitted). That conclusion, the court added, was bolstered by the fact that Natural's "contractual right to tie up CIG's pipeline capacity . . . was strictly limited by the duration of the Service Agreement" and that "the Trailblazer System ha[d] no power to prevent the erosion of its market share" once the contract came to an end (as it did on September 30, 1989). *Id.* at 27a & n.24; *see id.* at 24a-28a.

ARGUMENT

The court of appeals' rejection of CIG's bad-faith breach of contract and antitrust claims is narrowly fact-bound and raises no issue of general importance. Both of the court's rulings are correct, and neither ruling conflicts with any decision of this Court or of any court of appeals. Indeed, CIG has cited no other case that involves a pipeline's claim for breach of an implied contractual good-faith duty to purchase gas under a contract that has been modified by FERC to eliminate purchase obligations.[14] Nor has it cited any case that involves an

[14] Although CIG states that there are a "substantial number of contracts periodically modified or affected by actions of regulatory agencies such as FERC" (Pet. 12), CIG pointedly does not identify a single other *case* in which agency modifications of contracts have given rise to the issues presented in this case.

attempted-monopolization claim on facts remotely similar to those presented here. CIG's petition rests on new arguments not pressed below and on overreadings or misreadings of the court of appeals' decision. The petition should be denied.

I. THE COURT OF APPEALS' PREEMPTION RULING DOES NOT MERIT REVIEW.

1. CIG incorrectly argues that the court of appeals ruled that federal law ousts "the entire body of state contract law" (Pet. 12) and "the whole panoply of contractual claims and defenses" (*id.* at 15), while preserving all claims labeled as torts (*id.* at 14-15), regardless of the precise conduct and state remedy at issue. The court of appeals made no such sweeping ruling. Instead, the court focused its analysis and holding on CIG's particular contractual claim. The court correctly and narrowly concluded that CIG's claim was preempted under well-settled law. Pet. App. 9a-14a.[15]

First, CIG's claim for H-1 fixed costs as damages is preempted under the filed rate doctrine. Because the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, forbids pipe-

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[15] CIG has sought to escape the Tenth Circuit's preemption ruling through an untimely attempt to reformulate its bad-faith breach of contract claim. Until its rehearing petition in the court of appeals, CIG's claim was wholly derivative of its simple breach of contract claim that Natural's reduction in purchases violated Section 2 of the Service Agreement: it sought precisely the "same damages" based on "the same legal standards" (CIG C.A. Br. 90 n.97). CIG relied solely on the minimum volume specified in Section 2 and disputed only the proper *rate* for that volume, contending that an H-1 fixed-cost rate was proper (while Natural contended that the FERC-mandated F-1 fixed-cost rate was the proper rate). CIG did not put in issue—and therefore neither it nor Natural put on any evidence of—the *volume* of gas that Natural would have taken had it not allegedly acted in bad faith. *See* p. 7 & note 8, *supra*. Thus, CIG's new version of the contract claim, which asserts that there is no dispute about rate but only about volume (Pet. 14), was not presented below and is therefore not properly before this Court. In any event, for the reasons explained in text, CIG's contract claim is preempted in both its new and old versions.

lines like CIG to collect any rate not on file with FERC, no court, directly or indirectly, may award a pipeline under a regulated contract a rate that differs from the rate lawfully filed with FERC. *See Arkansas Louisiana Gas Co. (Arkla) v. Hall*, 453 U.S. 571 (1981). As the court of appeals recognized (Pet. App. 11a), FERC never approved the filing of an H-1 fixed-cost rate for gas not taken under the Service Agreement. Thus, CIG's claim is nothing but an impermissible attempt to recover an unfiled rate. *See Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91-92 (1963) (direct as well as indirect claims for unfiled rate barred).[16]

Second, CIG's damages claim seeks to recover not only an unfiled rate but a rate that FERC specifically rejected; it is therefore also preempted by, because in direct conflict with, FERC's affirmative *exercise* of its exclusive rate-setting authority. FERC expressly denied CIG's request for H-1 fixed costs for gas not taken, ruling instead that the only rate for such gas was to be the F-1 fixed-cost rate. 29 FERC ¶ 61,124 (1984). CIG unsuccessfully challenged those rulings on direct review. *CIG I*, 791 F.2d 803 (10th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987). Thus, the present lawsuit is simply an impermissible collateral attack on the FERC-established rate for untaken gas. The court of appeals correctly concluded (Pet. App. 11a):

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[16] CIG's contract claim was never based on any filed rate, contrary to CIG's suggestion that all it ever sought in damages was a filed rate (Pet. 14 & n.8, 19 n.18). Its own damage expert insisted that his damage calculations were not based on any filed tariff (Tr. 2564, 2793), and other CIG witnesses testified that they could not derive their damage claim from any filed rate (Tr. 595, 656, 5654). Moreover, CIG also sought (and was awarded by the jury) consequential damages for certain minimum bill payments to an upstream supplier. Those costs are nowhere on file with FERC as a separate rate (*see* Tr. 592-93), and the jury's assessment of the full amount of those costs against Natural is inconsistent with FERC orders allocating only a portion of them to Natural.

> Through its common-law claim of breach of the contractual duty of good faith and fair dealing, CIG obtained an award of damages that allowed it to collect H-1 fixed costs for unpurchased H-1 gas. FERC and this court have repeatedly denied CIG's request to modify the minimum purchase obligation of the Service Agreement to allow it to collect this rate for failure to purchase gas. *Colorado Interstate Gas*, 791 F. 2d at 808-09. By allowing CIG to press this claim, the district court gave CIG a second chance to which it was not entitled.

See Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 324 (1981) (common law damage action preempted because it was "little more than an attempt by a disappointed [regulated entity] to gain from the Iowa courts the relief it was denied by the Commission") (quoted by Tenth Circuit at Pet. App. 11a).

Third, the contract award for Natural's alleged bad-faith failure to purchase gas conflicts with FERC's orders invalidating the minimum purchase obligations of the CIG-Natural Service Agreement and similar pipeline contracts. As the court of appeals concluded, allowing that judgment to stand "would impermissibly undermine the effectiveness of [those] FERC orders." Pet. App. 14a. CIG's good-faith claim required the jury to determine whether Natural was obligated to purchase the gas in order "to accomplish the purposes of the contract" and to allow CIG "to enjoy the benefits of the contract"; the claim "emphasize[d] faithfulness to the purpose the parties agreed upon in the contract and consistency with the justified expectations of the other party." Tr. 8770-71 (jury instructions). Plainly, FERC's elimination of Natural's contractual obligation to purchase gas would be severely undercut if the same obligation could be indirectly reintroduced by a jury's ad hoc assessment of the "purposes" and "benefits" of, and the parties' "expectations" under, the contract. *Cf.*

Keogh v. Chicago & N.W. Ry. Co., 260 U.S. 156, 163 (1922) (uniformity of federal regulatory policy impaired by subjecting claims to post-hoc review by juries).

Thus, the Tenth Circuit properly explained that FERC's determination to free customers from express purchase obligations must have "room to breathe" (Pet. 12a), recognizing that the determination could not properly be subjected to ad hoc second-guessing by juries applying an implied "good faith" contract standard. Otherwise, the threat of liability would chill the exercise by pipeline customers of their FERC-granted freedom to "pick and choose among their pipeline suppliers" (*Order 380*, at 30,958, 30,962-63). *See Order 380-C*, at 31,187 ("a purchaser is more inclined to take the higher-priced gas than expose itself to damages resulting from a claim involving breach of contract"); *Order 380*, at 30,969 ("[I]t is important that pipeline customers be able to look at a tariff and know exactly what costs will or will not be incurred under the minimum bill."). The result would be to stall at the outset the mechanism that FERC put into place to force selling pipelines like CIG to reduce their prices and, in turn, to put pressure on the prices of their upstream suppliers. *Id.* at 30,962-63.

The impairment of FERC's important policy is especially clear in this case, because CIG is seeking damages based on allegations that FERC specifically considered when it invalidated minimum purchase obligations in the first place. FERC adopted its policy notwithstanding its express recognition that pipelines like CIG might lose sales, that customers might buy more expensive gas from other suppliers,[17] and that pipeline sellers might encounter difficulties with *their* suppliers

[17] Because gas *producers'* contracts, not modified by FERC, frequently involve a take or pay obligation, it is often prudent for a purchaser to buy nominally more expensive gas in order to avoid the costs that would otherwise be incurred if that gas were not purchased. Tr. 5641-44.

and might incur costs resulting from erratic swings on their systems. *Order 380*, at 30,963-64, 30,967-68; *Order 380-C*, at 31,185-86; *Order 380-D*, at 61,691. FERC also made clear that remedies were available before the Commission itself if a pipeline incurred unanticipated costs in meeting obligations to upstream suppliers or if a customer misused the newly granted rights by, for example, imprudently buying high-priced gas. *See Order 380-C*, at 31,185-87. Indeed, CIG itself twice unsuccessfully challenged the prudence of Natural's buying practices before FERC in Natural's rate proceedings. 34 FERC ¶ 61,280, at 61,495 (1986); 34 FERC ¶ 61,366 (1986); 30 FERC ¶ 61,222 (1985).[18] Allowing CIG's reargument of these very issues before a jury, under an implied good faith limitation on FERC's orders, "would permit circumvention of FERC authority through state contract law." Pet. App. 12a.

2. CIG erroneously argues that the court of appeals' decision rests on improper preemption principles. Pet. 15-19. The court correctly applied the well-established principles that pipeline rates are within the exclusive control of FERC (*Arkla v. Hall*, *supra*) and that claims based on state law are preempted when they "conflict with or interfere with" federal policy (*Kalo Brick*, 450 U.S. at 318-19).

CIG cites no decision conflicting with the Tenth Circuit's application of the filed rate doctrine. Nor does CIG cite any decision taking the unduly narrow view of "conflict" preemption that CIG advances. Pet. 18 & n.17. To the contrary, this Court has unanimously recognized that "State regulation . . . may be preempted as conflicting with FERC's authority . . . if [it] prevents attainment of FERC's goals." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 109 S. Ct. 1262, 1277 (1989). CIG proffers no reason or precedent suggesting that

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[18] Good faith is an element of prudence. *See National Fuel Gas Supply Corp. v. FERC*, No. 89-1025 (D.C. Cir. Apr. 10, 1990), slip op. 15.

validly adopted federal agency policies fall outside the familiar principle that a state measure is preempted when it is an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941); *see, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 182 (1983).

The Tenth Circuit's decision is also wholly consistent with the several regulatory-preemption decisions relied on by CIG (Pet. 15-18). In addition to the statutory filed rate doctrine, the present case involves a "conflict" with regulatory decisions. The cases relied on by CIG, in contrast, concern the quite different standards for "field" preemption: they establish that a federal agency may occupy a field of regulation, thereby preempting state measures that do not otherwise conflict with federal law or regulation; but to do so, the agency must make its intention known with particular clarity. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714, 717-18 (1985); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583-84 (1987). Those decisions, which themselves fully recognize the distinction between "field" and "conflict" preemption (*Granite Rock*, 480 U.S. at 581, 593; *Hillsborough*, 471 U.S. at 716, 719, 722), do not apply to a case like the present, which is governed by established "conflict" preemption principles, as the Tenth Circuit correctly concluded.[19]

3. Finally, contrary to CIG's argument (Pet. 13-14, 17-18), the court of appeals' ruling does not conflict with the agency or court decisions in either (a) the *Southern/Gulf States* case[20] or (b) the cases dealing with pipeline

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[19] The court of appeals relied on FERC's amicus brief, not to establish any sort of field preemption, but to confirm the evident meaning of the specific FERC orders with which the jury's contract damage award conflicted. Pet. App. 12a.

[20] *Gulf States Utils. Co. v. Alabama Power Co.*, 824 F.2d 1465, 1471 & n.7, 1474 (5th Cir. 1987); *Southern Companies Services, Inc.*, 37 FERC ¶ 61,256 (1986).

curtailment of gas deliveries during periods of shortage.[21] In contrast to the present case, none of those cases involved damage awards based on a rate specifically rejected by FERC. Nor can they be deemed to conflict with the decision below simply because they involved claims labelled "bad faith" that were not held preempted. The Tenth Circuit correctly understood that conflict preemption is inherently context-specific, requiring analysis of the precise nature of the particular state-law claim and its relation to the particular agency action in question. FERC obviously is not required to preempt all claims labelled "bad faith" or none, regardless of context. It is apparent, moreover, that the cases cited by CIG involved policies, settings, and holdings quite different from those of the present case.

CIG's lead case, the Fifth Circuit decision in *Gulf States*, wholly unlike the case CIG presented in the lower courts, involved no dispute over rates. Moreover, *Gulf States* specifically stated that a trial court could not award an unfiled rate. 824 F.2d at 1471.[22] In addition, the case simply involved enforcement of an express contract provision requiring good faith negotiations over volume changes. FERC had not invalidated that provision; indeed, FERC had approved it. *See Southern Company Services, Inc.*, 37 FERC ¶ 61,256, at 61,654 n.1. Enforcement of the negotiation clause thus presented no

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[21] *United Gas Pipe Line Co.*, 35 FERC ¶ 61,344, at 61,791 & n.22 (1986), *aff'd in relevant part, United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 420, 426, 427-30 & n.15 (5th Cir. 1987). *See also Transcontinental Gas Pipeline Corp.*, 35 FERC ¶¶ 61,043, 61,340 (1986); *United Gas Pipe Line Co.*, 4 FERC ¶ 61,151 (1978); *International Paper Co. v. FPC*, 476 F.2d 121, 125 (5th Cir. 1973); *Monsanto Co. v. FPC*, 463 F.2d 799, 808 (D.C. Cir. 1972).

[22] Only by pretending that its claim in this case is not about rates (*see* note 15, *supra*) has CIG been able even to allege a conflict with *Gulf States*. Pet. 13. Not surprisingly, CIG did not cite *Gulf States* in its brief to the court of appeals. CIG cited the decision for the first time in its rehearing petition.

conflict with any FERC policy, let alone with an agency determination to invalidate certain contract provisions on an industry-wide basis.

The curtailment cases likewise present no conflict. For one thing, as the Tenth Circuit pointed out (Pet. App. 13a-14a n.11), the lead Fifth Circuit decision in the curtailment cases, *United Gas*, specifically recognized distinctions between various types of "good faith" claims and indicated that a claim of "breach of a good faith duty" (*i.e.*, a claim like CIG's) was the kind that would be preempted by FERC's policy even in the curtailment context. 824 F.2d at 428 & n.15. Moreover, unlike the ruling CIG seeks here, the Fifth Circuit ruling in *United Gas* simply affirmed FERC's own policy, which expressly preserved certain remedies for bad faith curtailments of service. The Fifth Circuit thus held that allowing those remedies under state law could not interfere with FERC goals when FERC itself had deliberately provided for such remedies in order to *preserve* the contractual service obligation to the maximum extent possible consistent with a narrow defense based on lack of fault. 824 F.2d at 427. In the present case, by contrast, FERC had *eliminated* the minimum purchase obligations to further a broad policy of allowing buyers to "pick and choose" among suppliers—a policy that would be impaired by reintroducing a duty to purchase through the uncertain "good faith" contractual duty claimed by CIG. The Tenth Circuit's recognition that the contract award in this case would conflict with FERC orders, policies, and goals does not conflict with the decisions cited by CIG.

II. THE COURT OF APPEALS' ANTITRUST RULING DOES NOT MERIT REVIEW.

1. CIG rests its principal challenge to the court of appeals' attempted-monopolization ruling on the contention that this was a case of actual monopoly. CIG asserts that the court of appeals found the actual exercise of the

power to control prices and to exclude competition but stubbornly denied any dangerous probability of monopolization. Hence, according to CIG, the decision below erroneously holds that the test for monopoly power (and its dangerous probability) is high market share rather than the ability to control prices and to exclude competition. Pet. 12, 19-28. The court of appeals, however, neither found what CIG asserts nor endorsed the principle that CIG so vehemently disputes. Accordingly, the main issue that CIG raises in challenging the antitrust ruling is not presented by this case.

The Tenth Circuit has nowhere disputed the proposition that a party has actual monopoly power when it can control prices and exclude competition. Likewise, the Tenth Circuit has nowhere held that a particular market share is a necessary requirement for an attempted-monopolization claim if there is proof of actual monopoly power. To the contrary, the Tenth Circuit has expressly recognized both that monopoly power consists of the power to control prices and to exclude competition and that "while market share is indicative of market power, it is not the sole matter to be considered in assessing a defendant's market strength." *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d 159, 161-62 (1986). *See also* Pet. App. 21a, 25a. CIG identifies no language in the opinion below that repudiates, modifies, or even questions those settled principles.

Nor does the decision below find, explicitly or implicitly, that CIG had proven the achievement of power to control prices and exclude competition. CIG's argument focuses exclusively, and repeatedly, on the court of appeals' reference to "supracompetitive prices" (Pet. App. 27a). But that reference was made in the course of an essentially hypothetical discussion—which was itself unnecessary to the holding—of the relevance of market-strength durability to a Section 2 violation. Pet. App. 24a-28a. Nowhere in the opinion did the court state that

it had before it any issue of actual monopoly power. Indeed, while expressly recognizing that supracompetitive pricing was a major evil that the antitrust laws guard against (*id.* at 25a), the court stated that it was "convinced that Natural's conduct did not threaten to give the Trailblazer System the degree of market power that would constitute a monopoly" (*id.* at 24a). And, of course, the court concluded that, from the outset, there was not even a reasonable chance that such power would be obtained. *Id.* at 23a-24a, 28a.

It is not surprising that the Tenth Circuit did not find that the "Trailblazer System" already had monopoly power over prices and competition. The jury did not find such power; the instructions did not ask it to determine whether such power had been proven;[23] and CIG did not argue to the jury that it had proven such power.[24] Nor could the Tenth Circuit have found that supracompetitive prices and power to exclude competition were established as a matter of law: CIG made no such argument, and any such argument would have been frivolous. Indeed, CIG told the court of appeals that "higher prices did not result from the putative monopolist unilaterally raising its rates above some previously prevailing competitive level." C.A. Br. 57. And far from proving that any shippers were forced to accept higher

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[23] Accordingly, such power cannot be inferred from the jury's general dangerous probability finding. The district court therefore clearly erred in drawing such an inference—and in identifying the putative monopolist—when it said that the jury found that "NGPL possessed the power to control prices and exclude competition." Pet. App. 52a. While CIG tries to suggest otherwise (Pet. 10 n.5), the jury instructions did not present the issue of *actual* monopoly power to the jury, but only of "market strength that approaches monopoly power." *See* Tr. 8777-84.

[24] CIG's closing argument, far from asserting any claim of actual monopoly power, specifically stated only that Natural "attempted to monopolize that long distance transportation market, and very closely, very closely, has come near succession [*sic*]." Tr. 8616.

prices, CIG showed that only one shipper (other than Natural) gave new business to the "Trailblazer System" rather than to CIG, and that shipper did so to obtain *lower* prices.[25] Moreover, the court of appeals specifically noted CIG's failure to prove that its loss of market share was caused by unavailability of its capacity—a necessary predicate for any claim of exclusionary effects. Pet. App. 22a-23a n 19.[26] In short, the court of appeals was not presented with, and the record does not support, CIG's current theory that this is a simple Section 2 case involving the putative monopolist's charging of supracompetitive prices.

In rewriting its antitrust theory to argue that supracompetitive prices were in fact charged, CIG studiously avoids the obvious question of who it was that actually charged such prices. (That question is inextricably entwined with the issue of dangerous probability that this Court would have to decide in judging CIG's conduct-based monopoly claim.) Plainly the "Trailblazer System" did not do so, because it simply does not charge any prices.[27] Rather, each of the three independent constituent

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[25] *See* note 6, *supra*. That some prices on the "System" were higher than CIG's prices does not support an inference of supracompetitive prices. Even if an antitrust court could find FERC-approved prices to be illegally supracompetitive (*but see Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156), such a finding could not be grounded on the fact—which is the most that CIG proved—that FERC approved some prices on the newly built "Trailblazer System" at levels higher than those on the older CIG pipeline in order to reflect contemporary construction costs. No one has ever suggested that such regulated cost-based rates are supracompetitive.

[26] In fact, CIG not only retained its existing business but actually acquired new long-distance transportation business during the period in question—a period of "record profitability" for CIG (Pet. App. 27a n.25). *See* DX 3003, Tr. 748-51, 8282. As we have noted, CIG never showed what portion, if any, of its capacity or of market capacity was affected by Natural's conduct. *See* note 10, *supra*.

[27] CIG has vigorously insisted, since trial, that its antitrust claim is that the "Trailblazer System" rather than Natural was

pipelines charged its own rates, which were established by FERC. As noted above, CIG owns 100% of one of those three while the other two are owned by a variety of companies, none of which owns more than a third of either of the other pipelines. *See* p. 6, *supra*. Thus, CIG's reticence as to which pipeline is supposed to have charged supracompetitive prices may reflect the uncomfortable fact that its antitrust theory has defendant Natural conferring a monopoly upon plaintiff CIG.

2. CIG has likewise mischaracterized the decision below in suggesting that the Tenth Circuit ruled that proof of a higher market share than 54% "is invariably a prerequisite" or "a necessary condition" for proof of an attempted-monopolization case. Pet. 22-23, 24-25. Instead, the court made just the opposite point, stating: "If this were a typical attempted monopolization case . . . we would have little difficulty in affirming the jury's finding of dangerous probability" based on the assumed 54% market share. Pet. App. 21a. Recognizing that this case is far from typical, however, the court correctly concluded that, even accepting CIG's narrow market definition or its market-share figures, the unique circumstances of the case make clear that Natural never had the ability to propel the putative monopolist—the "Trailblazer System"—to monopolistic control over long-distance transportation of Wyoming natural gas. *Id.* at 22a-28a.

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the putative monopolist. *See* Pet. App. 17a; CIG C.A. Br. 56, 58-59 & n.59, 61 n.64; Tr. 8777 (jury instruction requiring proof of "specific intent on the part of Natural to create a monopoly in the relevant market for the Trailblazer System"). Nevertheless, without overtly changing its claim, CIG now repeatedly suggests that it was *Natural* that charged supracompetitive prices and had monopoly power. *See* Pet. 3 (conduct enabled "NGPL to expand market share to 54% while charging 'supracompetitive prices'"); *id.* at 10 ("NGPL had in fact *succeeded* in exercising monopoly power"); *id.* at 11 (conduct "enabled NGPL both to increase the Trailblazer System's market share to 54% *and* 'to charge supracompetitive prices'").

The court based its ruling on three unusual factors. First, the assumed 54% market share was of inherently limited significance in the unique setting presented by CIG's claim that Natural attempted to monopolize not for itself but for a group of other entities. As the court of appeals noted, "the *Trailblazer System*'s substantial market share . . . does not indicate *Natural's capacity* to raise the Trailblazer System's market share to a monopolistic level." Pet. App. 22a. And because the "system" was the passive beneficiary of Natural's alleged improprieties, its rise in market share does not evince a "proclivity or ability to monopolize." *See* Pet. App. 18a n.15. Second, Natural's alleged misconduct was based not on economic power in the market place, which might continue and expand, but entirely on a contract right that "strictly determined and ultimately limited" Natural's ability to increase the "Trailblazer System's" market share to non-monopoly levels. *Id.* at 22a-23a. In other words, Natural had already exhausted its ability to increase the "system's" market share.[28] Third, even that

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[28] Indeed, the court observed that no causal connection had been established between the alleged market share increase and any tying up of CIG's capacity. "The record does not clearly disclose how much of the Trailblazer System's market share gain reflected increased transportation volumes because CIG was unavailable as a competitor, and how much the market share gain simply resulted from the Trailblazer System's constant sales levels in comparison with CIG's sales losses." Pet. App. 22a-23a n.19.

Because CIG's claim failed even on its own terms, the court of appeals had no occasion to question CIG's use of actual shipments (in a time of glut) as the measure of market share. Of course, it is capacity rather than shipments that determines the ability of rival pipelines to serve shippers and thereby to discipline a would-be monopolist. CIG presented no evidence whatever of the share of overall pipeline capacity or of its own capacity that was affected by Natural's conduct. The claim that 50% of CIG's capacity was affected (Pet. 8) is devoid of record support, and the court of appeals did not "confirm[]" (Pet. 24) that only the "Trailblazer System" had capacity available.

increase could not be sustained, for it was a certainty that Natural's contract-based ability to increase or maintain the "Trailblazer System's" share of the market would come to an end when the contract expired on September 30, 1989. *Id.* at 26a-27a nn.23, 24. The Tenth Circuit's ruling, resting on those unique factors (not approached in any other case identified by CIG), presents no issue of general significance warranting this Court's review.

3. Just as the Tenth Circuit's fact-specific analysis defeats CIG's effort to draw out a broad legal ruling concerning market share, so too CIG must fail in its request for review of the portion of the court's opinion pointing out the inherent time limits on Natural's ability to maintain the alleged 13% rise in the "Trailblazer System's" market share. Pet. 23-24. First, the court's holding that there was no danger that monopoly power would be obtained even for a single day makes it fanciful to suggest that the decision will be read to establish—in what would then clearly be *dicta*—that six years of actual monopoly power is outside the reach of Section 2. In its context, moreover, the Tenth Circuit's discussion does no more than emphasize that the temporary nature of an increase in market share should be considered in deciding whether a firm that has not attained monopoly power could do so by acquiring further market strength. Pet. App. 24a-27a. That conclusion is entirely correct, particularly where, as here, the defendant's time-limited conduct created no monopoly power, allowed no additional moves toward such power, and gave the putative monopolist "no power to prevent the erosion of its market share." *Id.* at 27a n.24.

4. CIG's effort to paint the decision below as raising a conflict with other circuit court decisions is no more successful than its various claims that the Tenth Circuit announced broad and novel legal principles. First, the decision below does not conflict with the Fifth Circuit's decision in *Associated Radio Serv. Co. v. Page Airways,*

Inc., 624 F.2d 1342 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981). Pet. 20-21. Because the present case does not involve a finding that the putative monopolist actually had the ability to charge supracompetitive prices, CIG's attempt to analogize the case to *Page* fails on its own terms. Pet. 20-21. In addition, the conduct at issue in *Page*—*e.g.*, bribery of government purchasers, suborning a rival's employees during their employment, theft of trade secrets, sham litigation—was the kind that readily suggests continued expansion of the defendant's market share. 624 F.2d at 1354-55. The conduct in the present case, by contrast, was strictly limited in its capacity to expand market power of the putative monopolist, who was not even the defendant. In any event, the Fifth Circuit in *Page* expressly emphasized, "The holding of this case rests on a narrow foundation, and only those cases coming within the ambit of these particular facts should be considered." *Id.* at 1358. *See also Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 894 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) ("*Page* must be read on its facts.").

CIG also contends that the Court should take this case because the Tenth Circuit's standard for judging attempted monopolization conflicts with Ninth Circuit precedent. As articulated in *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964), and in subsequent decisions, the Ninth Circuit's view is that, in appropriate circumstances, dangerous probability may be inferred from conduct implementing an unequivocal specific intent to monopolize, without direct evidence of market share suggesting proximity to monopoly power. Pet. 21-22.[29] CIG's request for review on this ground is meritless.

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[29] Citing *H.J., Inc. v. ITT*, 867 F.2d 1531 (8th Cir. 1989), CIG suggests that the Eighth Circuit recently has adopted the Ninth Circuit's view. Pet. 22. In fact, the *H.J.* court expressly declined to rule on the question, noting that the findings in that case made it unnecessary to decide "whether a relevant product

Initially, the Tenth Circuit has explained that the difference between the Ninth Circuit's standard and its own —a difference, after all, not over the elements of an attempted-monopolization claim, but only over the type of evidence that suffices to prove those elements—is of little if any practical significance. *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F.2d at 163. Even if the difference in standards warranted review in a proper case, however, this is not such a case. First, CIG urged neither the district court nor the court of appeals to adopt the Ninth Circuit standard. Second, not even the Ninth Circuit has ever dispensed with the element of dangerous probability [30] or held that dangerous probability can be inferred where, as here, the court concludes that achievement of monopoly status is impossible.[31] Finally, the jury instructions given below would not have satisfied the strict Ninth Circuit standard for inferring dangerous probability without direct market evidence,[32]

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and geographic market must be identified" (which is not always required under the *Lessig* line of cases). 867 F.2d at 1541 n.6. The 1976 Justice Department memorandum cited by CIG (Pet. 23-24), while apparently reciting the Ninth Circuit's view, did so in the course of explaining the Department's voluntary *dismissal* of a complaint in a particular case, finding the standard not to have been met. In any event, for the reasons explained in text, review of the issue is not warranted here.

[30] To the extent that CIG seeks certiorari to establish that dangerous probability of success is not an element of an attempted-monopolization case at all (Pet. 22-23), that suggestion is patently without merit. CIG did not so contend in either of the lower courts, and CIG has cited no decision of any court that so holds.

[31] *See Rickarts v. Canine Eye Registration Foundation*, 783 F.2d 1329, 1335-36 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986) (where prospect of monopoly power is "implausible," the conduct standard for inferring dangerous probability is not applicable).

[32] The Ninth Circuit has held that an inference of dangerous probability may be drawn from conduct that supports an inference of specific intent, but the latter inference is not permitted unless the conduct at issue would "enhance the firm's long-term ability to reap the benefits of monopoly power" and "makes sense only

and the evidence could not support such a finding.[33] Hence, application of the Ninth Circuit standard would not lead to a different result in this case.

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because it eliminates competition." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1030-31 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). The jury in this case was not given such an instruction, but was allowed to infer the specific intent if it found that "*a* natural and probable consequence of a party's conduct was control over prices and exclusion of competition." Tr. 8781-82 (emphasis added). (The instruction giving Natural an affirmative defense if it could prove "a valid business purpose" (Tr. 8783) is not equivalent to or sufficient to satisfy the Ninth Circuit standard.) Although *Inglis* observed that "[d]irect evidence of intent" might permit reliance on more ambiguous conduct (668 F.2d at 1030), the Ninth Circuit there specifically stated, "the general standards for conduct that we discussed in the text must be the ultimate touchstone" for judging dangerous probability. *Id.* at 1030 n.15. The text referred to sets forth the strict standard quoted at the outset of this footnote.

[33] According to CIG itself, one of Natural's motives in buying gas from Wyoming producers rather than from CIG was to ship more gas over the "Trailblazer System" and thereby reduce per-unit costs. CIG C.A. Br. 7. That motive—whatever else Natural may have been charged with—"makes sense" economically wholly apart from any interest in conferring monopoly power on the three pipelines (including CIG's) that make up the "System."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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